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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.5583 OF 2005

M/s. Atul Medical,
Kalyan Heights,
1041, Sadashiv Peth,
Pune - 411 030. ... Petitioner
(Orig. Plaintiff)

Versus

M/s. Cadila Healthcare Pvt. Ltd.
Zyduff Towers, Safe Light Road,
Cross Road, Ahmedabad - 380 015.) ... Respondent
(Orig. Defendant)

Mr. Anil Anturkar with Ms. Vinita V. Bakre-Shastry for the petitioner.

Mr. Percy Gandhy i/b Mr. R.G. Sheth & Co. for the respondent.

CORAM: SMT. RANJANA DESAI, J.

DATED: 6TH SEPTEMBER, 2005.

ORAL JUDGMENT:-

1. Rule. By consent, taken up for final hearing.

2. The petitioner is the original plaintiff. The petitioner filed Special Civil Suit No.263 of 1998 for declaration and permanent injunction challenging the acts of defendant 1 in invoking bank guarantee of Rs.8 lacs given by defendant 2 for and on behalf of the plaintiff to defendant 1 as illegal, bad in law and void. Shortly stated in the plaint, it is alleged that the plaintiff firm commenced business as superstockists on 7/2/1997 and as per the terms and conditions of the agreement, the

plaintiff gave a bank guarantee amounting to Rs.8 lacs to defendant 1. As per the request of the plaintiff, defendant 2 issued a bank guarantee. As the business was slack, the plaintiff could not pay defendant 1's bills promptly. According to defendant 1, the outstanding bills of the plaintiff are Rs.5,65,709.21. The plaintiff disputed the amount. Defendant 1 threatened to invoke the bank guarantee and, hence, the suit came to be filed.

3. It appears that during the pendency of the suit, an application for temporary injunction was made which was rejected. An appeal from order was preferred by the petitioner in this court which was dismissed. On 3/5/1999, the Letters Patent Appeal filed by the petitioner was admitted by this court and the civil application for stay came to be disposed of with a direction that the petitioner should deposit an amount of Rs.6 lacs in this court and out of the said amount, defendant 1 was allowed to withdraw a sum of Rs.4 lacs and the balance amount of Rs.2 lacs was directed by this court to be invested in the nationalised bank.

4. Respondent 1 challenged this order by filing an SLP in the Supreme Court. The said SLP was disposed of on 3/1/2000 whereby the plaintiff was directed to deposit the sum of Rs.30,000/- in addition to Rs.6 lacs already deposited in this court. The said amount was allowed to be withdrawn by defendant 1. In pursuance of the said order, the plaintiff has deposited an amount of

Rs.30,000/- and respondent 1 has withdrawn the said amount. On 7/2/2004, the petitioner made an application for amendment of the plaint, which was rejected by the trial court. By the amendment application, the plaintiff inter alia wanted to bring on record certain subsequent events like the fact that the plaintiff has deposited Rs.6 lacs in this court, that Rs.4 lacs have been withdrawn by defendant 1, the filing of the SLP by defendant 1 in the Supreme Court and the direction of the Supreme Court that the plaintiff should deposit Rs.30,000/- in this court and that the said amount has already been withdrawn by defendant 1. The plaintiff further wants to bring on record that the plaintiff is not liable to pay the said amount to defendant 1 and in fact a lesser amount is due to defendant 1 and, therefore, defendant 1 has received excess payment which defendant 1 is liable to return. The plaintiff wants to add particulars of his claim. The plaintiff's claim against defendant 1 is now Rs.18,34,175.32. The plaintiff also wants to amend the prayer clause by praying for a decree in the sum of Rs.18,34,175.32. The trial court rejected the application holding inter alia that the proposed amendment would change the nature of the suit.

5. I have heard, Mr. Anturkar, the learned counsel appearing for the petitioner. He relied on the judgments of the Supreme Court in **Pankaja and another v. Yellappa (Dead) by LRs. and others, (2004) 6 SCC 415 and Ragu**

Thilak D. John v. S. Rayappan and others, (2001) 2 SCC 472. He also relied on the judgments of this court in Tantrik Shikshan Karmachari Gruha Nirman Sahakari Sanstha, Nagpur through its Secretary K.T. Mulekar v. Shankar s/o. Tulshiram Kamble & Ors., 1986 (2) Bom.C.R. 504 and Aasma Abdul Majeed and another, v. Jayram Arjun Tisge and otehrs, 1999 (1) Mh.L.J. 17, and contended that if the proposed amendment is viewed in the light of the above judgments, it must be allowed and the trial court erred in rejecting the amendment application.

6. Mr. Gandhy, the learned counsel appearing for the respondent on the other hand contended that no interference is necessary with the impugned order. He contended that the proposed amendment would change the nature of the suit. It introduces a new cause of action, which is time barred. He points out that the plaintiff is claiming an amount of Rs.1,32,130/- being godown rent from February, 1998 till 6/2/2004. Therefore, a time barred cause of action is sought to be introduced which is not permissible. In support of his contention, the learned counsel relied on the judgments of the Supreme Court in **Punjab National Bank v. Indian Bank and another, AIR 2003 SC 2284, S. Kumar v. The Institute of Constitutional and Parliamentary Studies and others, AIR 1984 SC 59, T.L. Muddukrishna and another, v. Smt. Lalitha Ramchandra Rao, AIR 1997 SC 772, M/s. Bharat Coking Coal Ltd. v. Raj Kishore Singh and another, AIR 2000 SC 3577(1), Muni Lal v. The Oriental Fire & General**

Insurance Company Ltd. and another, AIR 1996 SC 642.

7. In my opinion, the trial court erred in rejecting the application. The proposed amendment merely introduces certain additional facts which are not inconsistent with the averments made in the plaint. The subsequent events which are sought to be brought on record arise out of the facts which are the basis of the suit. On the basis of the said subsequent events, the plaintiff is seeking certain further reliefs. Neither the proposed new paragraphs nor the proposed prayers change the nature of the suit by introducing something which is diametrically opposed to the averments made in the plaint. It cannot be said that the amendment destroys the effect of the earlier averments.

8. In this connection, I may usefully refer to **Ragu Thilak's case (supra)** where the Supreme Court was dealing with a case where the plaintiff filed a suit against the respondents for permanent injunction restraining them from demolishing his compound wall. According to the plaintiff, during the pendency of the suit, respondents entered his property and demolished the wall on northern, eastern and western sides. He filed an application for amendment of plaint including incorporation of relief of recovery of damages. The High Court rejected the amendment application. The Supreme Court observed that the argument that the amendment sought would change the nature of the suit, which was originally filed, was not a

reason for refusing application for amendment because the dominant purpose of Order 6 Rule 17 of the Civil Procedure Code (for short, "the CPC") was to minimise the litigation. The Supreme Court also negatived the argument that the amendment cannot be allowed because the relief sought to be introduced was barred by limitation. The Supreme Court held that where it is arguable that relief sought by way of amendment would be barred by law of limitation, amendment should still be allowed and the disputed matter made the subject-matter of an issue. Mr. Gandhy sought to distinguish the facts of this case from the facts on hand. In my opinion, the principle enunciated by the Supreme Court would be applicable to the present case also. The judgment of the Supreme Court in **Ragu Thilak's case (supra)** cannot be restricted to its own facts but will have a wider application and, in any event, in the instant case, I am of the opinion that the amendment would not change the nature of the suit as it merely seeks to add subsequent events and even the prayer clause sought to be introduced is the obvious consequence of these events.

9. I may also usefully refer to **Pankaja's case (supra)**, where the amendment application was filed six years later. The plaintiff's suit was for permanent injunction. The plaintiff had sought to amend the plaint to seek the relief of declaration of the plaintiff's ownership of the suit property. It was argued that the relief was barred by limitation. The Supreme Court

observed that there is no absolute rule that in every case where a relief is barred because of limitation an amendment should not be allowed. Discretion in such cases depends on the facts and circumstances of the case. Since the jurisdiction to allow or not to allow an amendment is discretionary, the same will have to be exercised on a judicious evaluation of the facts and circumstances in which the amendment is sought. The Supreme Court clarified that if the granting of an amendment really subserves the ultimate cause of justice and avoids further litigation the same should be allowed. It was further observed that there can be no strait-jacket formula for allowing or disallowing an amendment of pleadings. Each case depends on the factual background of that case. The argument of Mr. Gandhy that the amendment is sought to be introduced after considerable lapse of time and, hence, has to be disallowed is concerned, it deserves to be rejected because in this case the Supreme Court was dealing with an amendment which was sought after six years.

10. I may also refer to the judgment of this court in **Tantrik Shikshan Karmachari's case (supra)** where this court has held that there is no inflexible rule that cause of action arising subsequent to the filing of the suit cannot be added by way of amendment. Introduction of a new case is no ground for refusal so long as the defendant has an opportunity of meeting the new case by amendment of written statement and by leading evidence in

support of that defence. In **Aasma Abdul's case (supra)**, this court has taken a view that the amendment sought as a result of subsequent events, which occurred during the pendency of suit ought to be allowed. These judgments, in my opinion, cover the instant case.

11. The reliance placed on the judgment in **Punjab National Bank's case (supra)** is wholly misplaced. In that case, the Bank had given Bank Guarantee in U.S. Dollars. On it's failure to honour it, a suit for recovery was filed. The amount to be recovered was mentioned at various places in the plaint in terms of U.S. Dollars and its equivalent in Indian Rupees was also given. The plaintiff filed application for amendment of plaint seeking deletion of figures shown in terms of Indian Rupees, wherever they occurred in the plaint including prayer clause. The Supreme Court held that the plaintiff was entitled to amend the plaint as the amendment was clarificatory in nature. The Supreme Court noted the principles laid down in several judgments that amendment should be allowed except where it causes injustice to the other side or if it is not necessary to determine the real question in controversy between the parties; that pre-trial amendments may ordinarily be permitted; that where the amendment does not change the basic structure of the suit but introduces a cause of action which arose during the pendency of the suit it should be allowed to be introduced including the nature of the relief; that while considering amendment

application, plaint has to be considered as a whole and not merely the prayer clause. The Supreme Court referred to the judgment in **L.J. Leach & Co. v. Jardine Skinner & Co. Ltd., AIR 1957 SC 357** and reproduced the observation made in that judgment that even a time barred amendment could be allowed if it is required in the interest of justice. The Supreme Court then observed that an amendment would generally not be disallowed except where a time barred claim is sought to be introduced, there too it would be one of the factors for consideration.

12. In my opinion, the observations of the Supreme Court in **Pankaja's case (supra)** in fact help the petitioner. Here by way of the amendment, certain subsequent facts which are to the knowledge of the respondent are sought to be introduced. The respondent is not taken by surprise. The amendment is pre-trial amendment and the basic structure of the suit is not changed thereby. The amendment does not appear to be malafide at least at this stage.

13. The judgment of the Supreme Court in **S. Kumar's case (supra)**, will have to be confined to its own peculiar facts because in that case, the Supreme Court was dealing with an amendment application made during the hearing of the Special Leave Petition. The Supreme Court rejected the application after observing that for the first time throughout the protracted proceedings

commencing with the institution of the suit in 1975, the appellant was seeking to include a relief though the facts on the basis of which the relief was based were known to the appellant several years ago. This judgment can have no application to the present case.

14. In **T.L. Muddukrishana's case (supra)**, the suit was filed for mandatory injunction directing the respondent to comply with requirements in the agreement. During the pendency of the suit, an application was made for amending the plaint to incorporate relief of specific performance after expiry of three years from the date fixed by the parties under contract. That application was rejected. The Supreme Court upheld the rejection on the ground that by the date of filing of the application the suit was barred by limitation. This judgment does not help the petitioner because in the later judgment in **Raghu Tilak's case (supra)**, the Supreme Court has held that where the plea that the relief sought by way of amendment is barred by time is arguable it could be made subject matter of the issue after allowing the amendment.

15. In **Muni Lal's case (supra)**, the appellant-plaintiff sought permission to amend the suit during the pendency of the appeal. It is against this background that the Supreme Court observed that he cannot be permitted to amend the plaint after the suit was barred by limitation during the pendency of the proceedings in the appellate court. Besides, as held by the Supreme Court in its

later decision in **Raghu Tilak's case (supra)**, the plea of limitation can always be made the subject matter of an issue.

16. In **Bharat Coking Coal Ltd.'s case (supra)**, the Supreme Court, on facts which were before it, came to a conclusion that the amendment would have resulted in drastically changing the nature of dispute. Such are not the facts here. The said judgment would not be applicable to the case on hand.

17. In my opinion, therefore, none of the judgments cited by Mr. Gandhy help the respondent. The trial court erred in disallowing the amendment. The amendment is a pretrial amendment. It only seeks to add certain subsequent events. It does not change the basic facts averred in the plaint. If it is granted, it will avoid multiplicity of proceedings and minimise the litigation.

18. Hence, the impugned order dated 9/6/2004 passed by the Joint Civil Judge, Senior Division, Pune, in S.C.S. No.263 of 1998 is set aside. The amendment application of the petitioner is granted. Amendment to be carried out within six weeks. Needless to say that the defendant can file additional written statement.

19. Writ Petition is disposed of in the aforestated terms.

20. Rule made absolute.

21. At this stage, Mr. Gandhy the learned counsel for the respondent says that the petitioner is desirous of approaching the Supreme Court and, hence, this order may be stayed. Mr. Anturkar, the learned counsel for the petitioner objects. In the circumstances of the case, the trial of Special Civil Suit No.263 of 1998 is stayed for eight weeks from today.

(SMT. RANJANA DESAI, J.)